

]CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DOCKET NO. 16-621

DIVISION "D"

SECTION 12

ANNE LOWENBURG, ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED:

DEPUTY CLERK

**MOTION FOR CONTEMPT AND SANCTIONS,
FOR APPLICATION OF AN ADVERSE PRESUMPTION,
AND FOR EXPEDITED HEARING,
AND INCORPORATED MEMORANDUM IN SUPPORT**

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Dr. Josephine S. Brown, Nancy and Parke Ellis, Dr. Robert and Charlotte Link, Ross and Laurie McDiarmid, Jerry R. Osborne, Jack M. Stoler, Dr. William Taylor, Mark Hamrick and Elio, Charlotte, and Benito Brancaforte (collectively, *Lowenburg* Residential Trial Group 1, hereafter, "the Plaintiffs"), who respectfully request that this Court hold Defendant, the Sewerage and Water Board of New Orleans ("SWB"), in contempt of court for failure to comply with this Court's prior order and for intentionally abusing the discovery process by withholding critical evidence. Plaintiffs additionally request that this Court impose sanctions and employ an adverse presumption regarding Plaintiffs' claims of structural damages caused by modifications in the groundwater table which were a direct result of the SELA Project on Jefferson Phase 2. Trial in this matter commences on January 28, 2019. This Motion, Rule to Show Cause, and associated request for expedited consideration were provided to counsel for SWB on January 20, 2019 so that SWB would have time to provide an opposition, but these pleadings were not filed with the Court until Tuesday, January 22, 2019, because of the Court's closure on Monday, January 21, 2019. In support of their Motion, Plaintiffs respectfully submit the following.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Summary

As this Court is well aware, Plaintiffs long ago requested that SWB produce its engineer and consultant, Leonard Quick's (Quick & Associates), geotechnical data (piezometer and inclinometer readings) for Jefferson Phase 2. Despite Plaintiffs' repeated, detailed requests to SWB for Quick's piezometer data, SWB always maintained that they did not have this data, and that they could not obtain this data from Quick. In fact, through a recent third-party subpoena propounded by Plaintiffs, it is now evident that SWB has had this piezometer data in their possession since March, 2016, but withheld this data from Plaintiffs.¹

Specifically, Plaintiffs issued a third-party subpoena to Eustis Engineering Services, LLC ("Eustis"), (SWB's geotechnical engineer of record for Jefferson Phase 2) concerning Eustis's investigation of the "sink hole" problem and modifications in the groundwater table on Prytania Street directly caused by the Jefferson Phase 2 SELA Project. In response to this request, Eustis produced two email chains which show that SWB, through Anthony Stewart, has been in possession of Quick's piezometer data for Jefferson Phase 2 since March, 2016, yet failed to produce the data to Plaintiffs. SWB was obligated to produce this data. See attached Exh. "A," SWB email chains, *in globo*.

This is the *same* Quick piezometer data that Plaintiffs specifically requested in discovery from SWB beginning in 2016 (Commercial Discovery Scheduling Order, Documents to be Deposited, § I. K, H, I & J), and again in 2017 (see e. g., Sarah Lowman emails to Chris Wilson, September 15, 2017: detailed list of discovery items owed by SWB, Items 4, 5 & 7; September 17, 2017: detailed description of SWB/Quick missing data²), and was the subject of multiple Rule 10.1 conferences, Plaintiffs' Motion to Compel, a Court Order granting Plaintiff's Motion to Compel and ordering SWB to provide complete responses³, Plaintiffs' Public Records Requests to SWB

¹ The *Sewell* Plaintiffs, No. 2015-4501, also requested Quick's piezometer and inclinometer data from SWB and never received it from SWB to undersigned counsel's knowledge.

² The Commercial Plaintiffs' Motion to Compel against SWB, filed in Plaintiffs' companion suit, *M. Langenstein & Sons, et al. v. SWB*, No. 15-11971 c/w 15-11394, is attached as Exh. B; see Sarah Lowman's emails attached to that motion as Exhs. 5 and 7.

³ The Court's Order granting Plaintiff's Motion to Compel is attached as Exh. C.

(Items 10, 11 & 16)⁴, the Commercial Plaintiffs' subpoena to Quick⁵, Quick's Motion to Set Costs, and, finally, the Court's ruling on January 11, 2018, granting in part Plaintiffs' Motion and ruling any Quick production costs would ultimately be borne by SWB⁶.

On November 15, 2017, this Court granted Plaintiffs' Motion to Compel against SWB and awarded Plaintiffs' attorney's fees, ordering SWB to produce complete responses. In response, regarding Quick's piezometer data, SWB represented: "SWB is not in possession of piezometer reports and data for Jefferson II, which if they exist are solely in the possession of Quick, as has been represented to the Court and plaintiffs on multiple occasions."⁷ This statement repeats Mr. Stewart's representation at the Court's hearing on Plaintiffs' Motion to Compel that SWB did not have this data, had asked Quick for it, Quick did not provide it to SWB, and SWB could not get it from Quick. But, the attached emails (Exh. "A") now show that, indeed, Anthony Stewart and SWB's chief in-house engineers had this piezometer data in their possession as early as March, 2016. SWB withheld this crucial evidence from Plaintiffs; SWB's conduct is in willful violation of this Court's discovery order compelling SWB to produce it. Given SWB's email chains showing that SWB had the Quick data all along, SWB's conduct was intentional.

The newly discovered Quick piezometer readings are crucial to Plaintiffs' claims against the SWB. In their original Petition,⁸ and more specifically in their First Supplemental and Amended Complaint, Plaintiffs alleged that the SWB's design and placement of the cement box culvert on Prytania Street has permanently altered the natural subterranean flow of water from the Mississippi River toward St. Charles Avenue, adversely affecting the soils around and under the houses in the area and foundations, including most of the houses in this trial group on and near

⁴ Plaintiffs' Public Records Requests to SWB (Items 10, 11 & 16) are attached as Exh. D.

⁵ Plaintiffs' subpoena to Quick is included in the Court's record, No. 15-10789, attached to Plaintiffs' Motion to Compel against Quick.

⁶ The Court's Order of January 11, 2018 is attached as Exh. E.

⁷ SWB's Response to Order to Compel is attached as Exh. F.

⁸ See e.g., Plaintiffs' original Petition, Pars. 15, 16, 44 (B) and (F).

Prytania Street.⁹ The documents produced by Eustis, including the Quick piezometer data, support this claim.

This evidence is a game changer according to Dr. Rune Storesund. See attached, Exh. “H,” Dr. Rune Storesund’s Supplemental Report. This evidence shows that there are modifications in the groundwater table directly as a result of the SELA Project and these modifications have a large influence area that extends for blocks on and from Prytania Street. This evidence provides a strong basis to believe that virtually all of the houses in this trial group (and other Plaintiffs) sustained structural damage caused by the SELA Project, as well as susceptibility for future damage. Based on his review of the new Eustis production, Dr. Storesund opines:

[I]t is my opinion that modifications to groundwater occurred north and south of the TRS box culvert limits on Prytania Street as a direct result of the SELA 22 (Jefferson II) project. These project-induced groundwater modifications result in localized differential settlement potential, which is a significant factor of harm to properties surrounding (on the order of multiple blocks) the TRS box culvert limits.¹⁰

Plaintiffs just recently received Eustis’s production on the eve of trial. As such, Plaintiffs’ engineering experts, Dr. Rune Storesund and Stradford Goins (structural engineering expert), do not have sufficient time to thoroughly analyze the production, including the Quick piezometer data, in preparation for trial, resulting in a severe prejudice to Plaintiffs. Dr. Storesund estimates that it would take him 50 to 60 hours to thoroughly analyze this production, prepare a map of the area of the influence that extends for blocks on and from Prytania Street, and to prepare properly for trial, which would also cause these Plaintiffs to incur significant additional expert fees. Plaintiffs also will not have the opportunity in advance of trial to conduct any depositions relative to this newly discovery evidence. SWB, through its in-house counsel, withheld key, relevant evidence. Given the position this has put Plaintiffs in, and the SWB’s willful disregard of this Court’s prior orders, Plaintiffs are entitled to an adverse inference that the withheld information

⁹ See Plaintiffs’ First Supplemental and Amended Complaint, Par. 4, A-K, attached as Exh. G. Plaintiffs’ Second and Third Supplemental and Amended Complaints (also filed in federal court) make the same allegations for additional Plaintiffs. Likewise, Plaintiffs, Prytania Mail Service and Barbara West, made these same allegations in the Commercial Plaintiffs’ First Supplemental and Amended Complaint, Par. 3, A-J.

¹⁰ Exh. H, Dr. Rune Storesund’s Supplemental Report.

would be adverse to SWB's defenses. Specifically, Plaintiffs are entitled to, and request, an adverse inference that:

Modifications to groundwater occurred north and south of the TRS box culvert limits on Prytania Street as a direct result of the SELA 22 (Jefferson 2) project. These project-induced groundwater modifications resulted in localized differential settlement, which is a significant factor of harm to properties surrounding (on the order of multiple blocks) the TRS box culvert limits. As a result of these groundwater modifications, structures in this general vicinity, including the houses in Lowenburg Trial Group 1, sustained structural damage caused by the SELA Project.

The SWB's concealment of this important data should not be condoned by the Court.

B. Timeline of Plaintiffs' Prior Requests for Production to SWB

1. (2016) Federal Court (Commercial) DSO Documents to be Deposited (Ex. D)

Plaintiffs' first request to SWB for geotechnical data regarding measurement and monitoring of the subterranean water levels and flow from the Mississippi River toward and through Prytania St. during and following construction of the box culvert. See I. K. (see also requests H, I & J).¹¹ a. Response: No response in federal or state court.

2. August 16, 2017: State Court/Commercial Plaintiffs' Trial Group 1: Plaintiffs' R.10.1 conference held regarding SWB's failure to provide specific responses.

3. September 15, 2017: Sarah Lowman email to Chris Wilson with detailed list of outstanding items owed by SWB: Items 4, 5 & 7 specifically request Quick's geotechnical data, including piezometer data, & all documents regarding monitoring of the subterranean water levels and flow from the Miss. River through Prytania St.¹²

4. September 15, 2017: Chris Wilson email response to Sarah Lowman: references Quick survey point locations data in PSR depository.¹³

5. September 17, 2017: Sarah Lowman email reply to Chris Wilson: This is not geotechnical data—it is surface survey data. Ms. Lowman then provides a very detailed description of SWB's geotechnical data (i.e., Quick's data; piezometer & inclinometer) for Jefferson phase 2 that is missing and needs to be produced by SWB, by specific

¹¹ Attached as Exh. 2 to Plaintiffs' Motion to Compel, Exh. B.

¹² Exh. 5 to Plaintiffs' Motion to Compel, Exh. B.

¹³ Exh. 6 to Plaintiffs' Motion to Compel, Exh. B.

equipment location and reference to USACE bates numbered documents in the PSR document depository. For example, this includes the Locations: “outside the ROW on Octavia to the south of Prytania;” “Octavia on the north side of Prytania;”—locations near the sink hole area in the 5500 block of Prytania St., as well as other nearby locations.¹⁴

6. October 24, 2017: Commercial Plaintiffs file a Motion to Compel v. SWB for this specific geotechnical data, and other failures to respond and deficient responses.¹⁵
7. November 2, 2017: SWB files opposition. SWB states: “To the extent Quick may have collected data outside of the construction limits, as of the writing of this opposition, SWB is not in possession of any such data nor has provided same to its testifying experts.” Opp. p. 2. (emphasis added).¹⁶
8. November 15, 2017: Judge Ervin-Knott grants Plaintiffs’ Motion to Compel and awards Plaintiffs attorney’s fees against SWB, ordering SWB to produce complete responses.¹⁷
9. November 16, 2017: SWB’s Response to Order to Compel¹⁸:
 - a. Item 4 (DSO Ex. D, subparts (D) & (W)): “SWB is not in possession of piezometer reports and data for Jefferson II, which if they exist are solely in the possession of Quick, as has been represented to the Court and plaintiffs on multiple occasions.” (p. 7). (emphasis added).
 - b. Ans. to Interrogatory 11: Identifies Eustis as an entity who may possess information regarding the groundwater control system, French drains and weep holes, and sink hole issue, and suggests Plaintiffs send a subpoena to Eustis “as the SWB was not in possession of any responsive documents” and there are no

¹⁴ Exh. 7 to Plaintiffs’ Motion to Compel, Exh. B.

¹⁵ Exh. B, Plaintiffs’ Motion to Compel.

¹⁶ Exh. I, SWB’s opposition to Motion to Compel.

¹⁷ The Court’s Order granting Plaintiff’s Motion to Compel is attached as Exh. C.

¹⁸ Exh. F, SWB’s Response to Order to Compel.

designs, plans, or specifications concerning the ‘French drain’ installation, no separate invoices for that work, and SWB is not in possession of any written records concerning this issue.” (emphasis added).

10. October 31, 2017: Commercial Plaintiffs’ Public Records Requests to SWB: 18 items requested, including¹⁹;

- a. All requests from SWB to Quick for geotechnical data collected by Quick for Jefferson Phase 2, including the data previously requested through discovery. (paraphrased).
- b. All geotechnical data (i.e., piezometer & inclinometer) provided by Quick to SWB or obtained by SWB relating to Jefferson Phase 2. (paraphrased).
- c. All documents and communications related to geotechnical analysis, tests, measurement and monitoring of the subterranean water levels and/or flow from the Mississippi River through Prytania Street, including, but not limited to, monitoring of the purported groundwater control system and the sink hole(s) problem.

11. November 13, 2017: SWB’s Response: Email from Anthony Stewart to Sarah Lowman—No response or production of any Quick piezometer data or any documentation requested in Items 10, 11 or 16 (see above). (Response only offered Quick’s invoices for Jefferson phase 2 (& Claiborne) for copy costs of \$1,624).

12. November 3, 2017: Commercial Plaintiffs’ SDT to Quick per the Court’s Ruling on 11-3-2017 in open court: Requests/lists the same specific geotechnical data (piezometer/inclinometer) collected by Quick related to Jefferson Phase 2, including the specific piezometer locations specified before to SWB by Plaintiffs.²⁰

13. No data produced by Quick;

14. November 22, 2017: Plaintiffs filed Motion to Compel and for Sanctions versus Quick.

¹⁹ Exh. D, Plaintiffs’ Public Records Requests to SWB.

²⁰ Plaintiffs’ subpoena to Quick is included in the Court’s record, No. 15-10789, attached to Plaintiffs’ Motion to Compel against Quick.

15. December 4, 2017: Quick files Motion and Order to Set Costs;
16. December 7, 2017: Plaintiffs file Opposition to Quick's Motion;
17. December 15, 2017: Hearing on Motions;
18. January 11, 2018: Court's Ruling/Judgment granting in part Plaintiff's Motion and ruling any Quick Production Costs to ultimately be borne by SWB;
19. No Quick geotechnical data for Jefferson Phase 2 ever produced to Plaintiffs by SWB or Quick.

C. SWB's Emails Produced by Eustis Reveal SWB had Quick's Piezometer Data for Jefferson Phase 2 since March, 2016²¹

20. February 23, 2016: Anthony Stewart/SWB to Quick: Pursuant to their telephone conversation this morning, Stewart authorizes and instructs Lenny Quick to provide Jefferson Phase 2 piezometer data to the USACE per its attached request.
21. March 10, 2016: Quick to Anthony Stewart: Attaching the forensic geotechnical data (Piezometer data) requested by USACE for Jefferson phase 2 in an Excel sheet entitled: "SELA Jefferson Avenue phase 2 piezometer records-thr.-2-24-2016."—Chart is 20 pages.
22. March 15, 2016: Anthony Stewart to Moby Maqbool (SWB's chief in-house engineer): Sending the Quick data to Moby.
23. March 15, 2016: Moby to USACE: Sending Quick data to USACE.
24. March 15, 2016: USACE to Eustis: Sending Quick data to Eustis.
25. March 21, 2016: USACE email setting field meeting at the sink hole on Prytania St. Includes SWB/Moby Maqbool and SWB/Ron Spooner.
26. March 22, 2016: email from Sean Walsh/Eustis to John Fogarty/USACE & Moby Maqbool/SWB & others, including Ron Spooner/SWB: Asks Moby to request from SWB the March 2016 piezometer data-necessary for evaluation of hydrostatic conditions after weep hole installation while also during a period of high river stages.

²¹ Exh. 1, SWB email chains, *in globo*.

27. March 22, 2016: Moby Maqbool to Anthony Stewart: please request Quick to provide March data for Prytania as soon as possible.
28. March 23, 2016: Anthony Stewart to Quick: requests March data-please respond as usual.
29. March 24, 2016: Quick to Anthony Stewart: Providing to SWB and attaching as an Excel sheet the data for Jefferson Phase 2 through yesterday 3-23-2016;
30. March 28, 2016: Anthony Stewart forwards the Quick piezometer data to Moby Maqbool/SWB.
31. March 28, 2016: Moby Maqbool/SWB to USACE: sending the Quick piezometer data for March 2016.
32. March 28, 2016: USACE to Eustis: sending the Quick piezometer data for March 2016.

These emails show that Quick's geotechnical data for Jefferson phase 2 (piezometer readings) was directly sent by Quick to SWB (Anthony Stewart) electronically in March 2016. This is the same data that Plaintiffs have requested from SWB since 2016 (in federal court) and thereafter in state court, particularly in 2017. SWB always maintained that they did not have this data and that they could not obtain this data from Quick, when in fact they had this data in their possession the entire time.

III. LAW AND ARGUMENT

A party who refuses to obey an order establishing discovery is subject to:

such sanctions as are just, including the following: to establish facts as proven for purposes of the litigation, exclude claims or defenses, strike the pleadings; dismiss the action; or enter a default judgment. In addition, the court may treat the failure as contempt or order the payment of reasonable expenses and attorney's fees caused by the failure

MTU of North America, Inc. v. Raven Marine, Inc., 475 So. 2d 1063 (La. 1985); La. C.C.P. art. 1471. A finding of contempt of court, including a fine, costs and attorney's fees, is appropriate when a party ignores a court order requiring production of discovery responses and documents. *See, e.g., Times Picayune Publishing Corp. v. New Orleans Aviation Bd.*, 742 So.2d 979 (La. App. 5 Cir. 1999) (upholding award of contempt sanction of \$100 per day that party failed to produce documents and awarding a total of \$6,000.00 in attorney's fees).

While La. C.C.P. art. 1471 sanctions are triggered when a party violates a court order, even in the absence of such an order, La. C.C.P. art. 191 “authorizes trial courts to impose sanctions for [failing to adhere to discovery rules] since [such failure] clearly interferes with the court’s ability to fairly administer justice.” *Carter v. Hi Nabor Super Mkt., LLC*, 13-0529, p. 7-8 (La. App. 1 Cir. 12/30/14), 168 So.3d 698, 704. Thus, “[a] trial court has the authority to impose sanctions on a party for [. . .] discovery misconduct under both its inherent power to manage its own affairs and the discovery articles provided in the Louisiana Code of Civil Procedure.” *Id.*, 13-0529, p. 7, 168 So.3d at 703. A trial court has much discretion in selecting the appropriate sanctions for failure to comply with discovery orders. *Dufour v. Dow Chem. Co.*, 12-912, (La. App. 5 Cir. 5/23/13), 119 So.3d 630.

Contempt of court is any act or omission tending to obstruct or interfere with the orderly administration of justice or to impair the dignity of the court or respect for its authority. La. C.C.P. art. 221. The disobedience of any lawful judgment or order of the court constitutes constructive contempt of court. La. C.C.P. art. 224(2). To find a person guilty of constructive contempt, it is necessary to find that he or she violated an order of the court intentionally, knowingly, and purposely, without justification. *In re S. L. G.*, 40, 858 (La. App. 2d Cir. 12/5/06), 927 So.2d 363. The trial court is vested with great discretion in determining whether a party should be held in contempt for disobeying the court’s order. *Stevens v. Stevens*, 30, 498 (La. App. 2d Cir. 5/13/98), 714 So.2d 115. A proceeding for contempt for an individual’s refusal to obey the court’s order is not designed for the benefit of the litigant, though infliction of a punishment may inure to the benefit of the mover in the rule. The object of the proceeding is to vindicate the dignity of the court. *In re S.L.G.*, 927 So.2d at 363.

In spite of this Court’s Order, SWB wrongfully, and without justification, failed to produce Quick’s geotechnical data for Jefferson Phase 2, which SWB had in its possession. “Louisiana jurisprudence holds that when a litigant destroys, conceals, or fails to produce evidence within his or her control, it gives rise to an adverse presumption that had the evidence been produced, it would have been detrimental to the litigant’s case.” *Allstate Ins. Co. v. Ford Motor Co.*, 00-710, p. 4 (La. App. 3 Cir. 11/2/00), 772 So.2d 339, 342. Where a litigant fails to produce evidence available to him and gives no reasonable explanation, the presumption is that evidence would have

been unfavorable to his cause. *Wilson v. U.S. Fire and Casualty Company*, 593 So.2d 695 (La. App. 4 Cir. 1991), *writs denied*, 597 So.2d 1027 and 597 So.2d 1037 (La. 1992). *See also Rodriguez v. Northwestern National Insurance Company*, 358 So.2d 1237 (La. 1978). Due to SWB's failure to provide Quick's piezometer readings, Plaintiffs are entitled to an adverse presumption that the withheld information would be adverse to SWB's defenses.

Based on the above facts and law, in addition to all attorneys' fees and costs associated with the filing of this Motion, Plaintiffs are entitled to the attorneys' fees incurred in connection with their counsels' monumental efforts to obtain this hidden data, and the significant experts' fees incurred to assist counsel in attempting to obtain this data and the experts' increased work as a result of the absence of this data, as sanctions for SWB's egregious hiding of this important evidence. This additional work included, for instance, Plaintiffs' counsels' drafting of emails to SWB counsel detailing the missing Quick geotechnical data, which specific descriptions were provided by Dr. Storesund consuming his time and fees, large portions counsels' time during R. 10.1 conferences; drafting the Motion to Compel and preparing for and attending the hearing (again, a large portion of this motion concerned SWB's failure to produce the Quick data); drafting Public Records Requests to SWB (including requests for this data), drafting the subpoena to Quick, including experts' time, and numerous phone conversations with Quick's counsel and written communications; consultation time with experts (Dr. Rune Storesund, Gurtler Bros. Consultants, and Stradford Goins) regarding this issue in federal court in preparation of preliminary reports, and later in state court in connection with preparation of expert reports for all three (3) trial groups (Commercial Flight 1, Flight 2, and the present Lowenburg Residential Trial Group 1). Plaintiffs also incurred expert fees for the time spent on reports in all three trial flights that would have been saved if Plaintiffs had been provided this data by SWB. Plaintiffs' counsel also spent considerable time preparing for depositions and questioning witnesses in depositions regarding the subterranean water flow obstruction and related sink hole issue.

Sanctions against SWB should also include attorney and expert fees for Dr. Rune Storesund's supplemental report preparation, and Dr. Storesund's and Stradford Goins's supplemental time for trial preparation. Sanctions should additionally include attorney's fees and expert fees incurred in obtaining and reviewing the documents subpoenaed from Eustis that contain

the missing Quick data—fees that would have been saved if Plaintiffs had been given this data by SWB, and documents subpoenaed from Burk-Kleinpeter (SWB’s designer of record for Jefferson phase 2), which include memorandums from Eustis regarding the sink hole and the subterranean groundwater problem on and around Prytania Street, but not the actual Quick data.

Further, sanctions against SWB should also include an order refusing to allow SWB to oppose Plaintiffs’ claim that the modifications to the groundwater that occurred as a direct result of the SELA 22 (Jefferson 2) Project caused structural damages to Plaintiffs’ properties, including precluding SWB from responding to this new data with any evidence, or new witnesses, and precluding any testimony by Exponent addressing Plaintiffs’ claim and the subject data.

Finally, the Court should preclude SWB from requesting a continuance of the trial due to SWB’s unclean hands in failing to produce this evidence when in fact SWB had it for years.

WHEREFORE, Plaintiffs pray that this Court: (1) consider this Motion on an expedited basis in view of the trial commencing on January 28, 2019; (2) enter an Order holding SWB in Contempt of this Court’s Order; (3) award sanctions, including all attorneys’ fees and costs associated with the filing of this Motion, as well as all other attorneys’ fees and experts’ fees incurred by Plaintiffs due to SWB’s failure to produce the subject data as specified in the paragraphs immediately above, and further ordering SWB to pay the sanctions awarded to Plaintiffs within 30 days of the award; and (4) employ an adverse inference that the information withheld by SWB would be adverse to its defenses, specifically: “Modifications to groundwater occurred north and south of the TRS box culvert limits on Prytania Street as a direct result of the SELA 22 (Jefferson 2) project. These project-induced groundwater modifications resulted in localized differential settlement, which is a significant factor of harm to properties surrounding (on the order of multiple blocks) the TRS box culvert limits. As a result of these groundwater modifications, structures in this general vicinity, including the houses in Lowenburg Trial Group 1, sustained structural damage caused by the SELA Project.”

Respectfully submitted,


RANDALL A. SMITH (#2117)

SARAH A. LOWMAN (#18311)
MARY NELL BENNETT (#32339)
OF
SMITH & FAWER, LLC
201 St. Charles Avenue, Suite 3702
New Orleans, Louisiana 70170
Telephone: (504) 525-2200
Facsimile: (504) 525-2205
Email: rasmith@smithfawer.com
Email: salowman@smithfawer.com
Email: mnbennett@smithfawer.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing pleading has been served upon all counsel of record in this matter, via e-mail, telecopy, and/or U.S. Mail, properly addressed and postage prepaid, this 20th day of January, 2019.


SARAH A. LOWMAN

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DOCKET NO. 16-621

DIVISION "D"

SECTION 12

ANNE LOWENBURG, ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED: _____

DEPUTY CLERK

RULE TO SHOW CAUSE

Considering the foregoing Motion for Contempt and Sanctions, for Application of an Adverse Presumption, and for Expedited Hearing;

IT IS HEREBY ORDERED that a hearing is scheduled for the ____ day of January, 2019, at ____ o'clock ____m. to consider Plaintiffs' Motion for Contempt and Sanctions, and for Application of an Adverse Presumption.

Signed this ____ day of _____, 2019, in New Orleans, Louisiana.

HON. NAKISHA ERVIN-KNOTT

**SERVICE WILL BE EFFECTED
PURSUANT TO ARTICLE 1313.**

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DOCKET NO. 16-621

DIVISION "D"

SECTION 12

ANNE LOWENBURG, ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED: _____

DEPUTY CLERK

**MOTION AND INCORPORATED MEMORANDUM FOR EXPEDITED HEARING ON
PLAINTIFFS' MOTION FOR CONTEMPT AND SANCTIONS, AND
FOR APPLICATION OF AN ADVERSE PRESUMPTION**

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Dr. Josephine S. Brown, Nancy and Parke Ellis, Dr. Robert and Charlotte Link, Ross and Laurie McDiarmid, Jerry R. Osborne, Jack M. Stoller, Dr. William Taylor, Mark Hamrick and Elio, Charlotte, and Benito Brancaforte ("*Lowenburg Residential Trial Group 1*" or "*Plaintiffs*"), who respectfully ask this Court to hold an expedited hearing on their *Motion for Contempt and Sanctions, and for Application of an Adverse Presumption*, which is being filed contemporaneously with this Motion.

The Pre-Trial Conference in this matter is set on January 22, 2019 at 2:00 pm., and trial is set to commence on January 28, 2019. Accordingly, Plaintiffs respectfully request that this matter be set on an expedited basis in advance of trial.

WHEREFORE, for the foregoing reasons, the *Lowenburg Residential Trial Group 1* Plaintiffs pray that the Court grant this Motion and set a hearing on their *Motion for Contempt and Sanctions, and for Application of an Adverse Presumption* on an expedited basis in advance of trial.

Respectfully submitted,



RANDALL A. SMITH (#2117)
SARAH A. LOWMAN (#18311)
MARY NELL BENNETT (#32339)
OF
SMITH & FAWER, LLC
201 St. Charles Avenue, Suite 3702
New Orleans, Louisiana 70170
Telephone: (504) 525-2200
Facsimile: (504) 525-2205
Email: rasmith@smithfawer.com
Email: salowman@smithfawer.com
Email: mnbennett@smithfawer.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing pleading has been served upon all counsel of record in this matter, via e-mail, telecopy, and/or U.S. Mail, properly addressed and postage prepaid, this 20th day of January, 2019.



SARAH A. LOWMAN

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DOCKET NO. 16-621

DIVISION "D"

SECTION 12

ANNE LOWENBURG, ET AL.

VERSUS

SEWERAGE & WATER BOARD OF NEW ORLEANS

FILED: _____

DEPUTY CLERK

ORDER

Considering the foregoing Motion for Expedited Hearing filed by the *Lowenburg* Residential Trial Group 1 Plaintiffs ("Plaintiffs");

IT IS HEREBY ORDERED that Plaintiffs' Motion is GRANTED and that Defendant, the Sewerage & Water Board of New Orleans appear and show cause on the _____ day of January, 2019, at _____ o'clock __m., why this Court should not grant the Plaintiffs' *Motion for Contempt and Sanctions, and for Application of an Adverse Presumption*.

JUDGE NAKISHA ERVIN-KNOTT

SERVICE WILL BE EFFECTUATED PURSUANT
TO ARTICLE 1313.

Sarah A. Lowman

From: Mickal, Larry E MVN <Larry.E.Mickal@usace.army.mil>
Sent: Tuesday, March 15, 2016 1:57 PM
To: Gwen Sanders; Sean Walsh; Hickerson, Heather A MVN
Cc: Fogarty, John G MVN
Subject: FW: Jefferson Phase II piezometer data (UNCLASSIFIED)
Attachments: image003.png; SELA Jefferson Avenue Phase 2 - Piezometric Readings - thru 2-24-2016.xlsx

CLASSIFICATION: UNCLASSIFIED

Please see attached piezometer readings for Jefferson Ph 2.

-----Original Message-----

From: Templeton, John A MVN
Sent: Tuesday, March 15, 2016 1:55 PM
To: Mickal, Larry E MVN <Larry.E.Mickal@usace.army.mil>; Fogarty, John G MVN <John.G.Fogarty@usace.army.mil>
Subject: FW: Jefferson Phase II piezometer data

Please disseminate to all interested parties. Let me know if there is anything I can do to help in anyway. Thanks.

-----Original Message-----

From: MAQBOOL, Mubashir [mailto:mmaqbool@swbno.org]
Sent: Tuesday, March 15, 2016 1:41 PM
To: Templeton, John A MVN <John.A.Templeton@usace.army.mil>
Subject: [EXTERNAL] Fwd: Jefferson Phase II piezometer data

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "STEWART, Anthony" <ASTEWART@swbno.org>
Date: 03/15/2016 10:04 AM (GMT-06:00)
To: "MAQBOOL, Mubashir" <mmaqbool@swbno.org>
Subject: FW: Jefferson Phase II piezometer data

Moby, here is requested info.

From: Jared Bordelon [mailto:JBordelon@quickforensics.com]
Sent: Thursday, March 10, 2016 2:54 PM
To: STEWART, Anthony
Cc: Lenny Quick; Jennifer Negrotto
Subject: RE: Jefferson Phase II piezometer data

Mr. Stewart,

Please find attached a copy of the forensic geotechnical data requested by the COE for the above referenced project.
Feel free to contact our office should you have any questions.



Regards,

Jared M. Bordelon, P.E., M.B.A.
Senior Project Manager

[cid:image003.png@01D17ADC.4F149DC0]<Blockedhttp://www.quickforensics.com/>

Alamosa Business Park

21449 Marion Lane, Suite 6

Mandeville, LA 70471

Office: (985)-249-5130<tel:985-249-5130>

(877)-224-4500<tel:1-877-224-4500>

Cellular: (318)-359-0236

Email: jbordelon@quickforensics.com<mailto:jbordelon@quickforensics.com>

Blockedwww.quickforensics.com<Blockedhttp://www.quickforensics.com/>

From: STEWART, Anthony [mailto:ASTEWART@swbno.org]

Sent: Tuesday, February 23, 2016 10:33 AM

To: quickforensics@aol.com<mailto:quickforensics@aol.com>

Cc: Jennifer Negrotto; SPOONER, Ron; BECKER, Joe

Subject: Jefferson Phase II piezometer data

Lenny, pursuant to our telephone conversation of this morning, attached is a copy of correspondence from USACE requesting Jefferson Phase II piezometer data. This will confirm that you are authorized to provide same in accordance therewith.

CLASSIFICATION: UNCLASSIFIED

Sarah A. Lowman

From: Mickal, Larry E MVN <Larry.E.Mickal@usace.army.mil>
Sent: Monday, March 28, 2016 1:46 PM
To: Gwen Sanders; Sean Walsh
Cc: Templeton, John A MVN; Hickerson, Heather A MVN
Subject: FW: Prytania visit. (UNCLASSIFIED)
Attachments: image001.png; SELA Jefferson Avenue Phase 2 - Piezometric Readings - thru 3-23-2016.xlsx

CLASSIFICATION: UNCLASSIFIED

Gwen and Sean,

Please see below. I don't know if this is additional information or another transmittal of information you currently have. Please review.

Thanks,
Larry

-----Original Message-----

From: Templeton, John A MVN
Sent: Monday, March 28, 2016 10:50 AM
To: Mickal, Larry E MVN <Larry.E.Mickal@usace.army.mil>
Subject: FW: Prytania visit.

-----Original Message-----

From: MAQBOOL, Mubashir [mailto:mmaqbool@swbno.org]
Sent: Monday, March 28, 2016 10:39 AM
To: Templeton, John A MVN <John.A.Templeton@usace.army.mil>; Fogarty, John G MVN <John.G.Fogarty@usace.army.mil>
Subject: [EXTERNAL] FW: Prytania visit.

FYI.

MUBASHIR MAQBOOL, P.E.
Principal Engineer
Network Engineering
Sewerage & Water Board of New Orleans
(504)865-0653

From: STEWART, Anthony
Sent: Monday, March 28, 2016 10:32 AM
To: MAQBOOL, Mubashir
Subject: FW: Prytania visit.

Moby, see attached.

From: Jared Bordelon [mailto:JBordelon@quickforensics.com]
Sent: Thursday, March 24, 2016 11:06 AM
To: STEWART, Anthony
Cc: quickforensics@aol.com <mailto:quickforensics@aol.com> ; Lenny Quick; Jennifer Negrotto
Subject: RE: Prytania visit.

Mr. Stewart,

As requested, please find attached a copy of the data for Jefferson Avenue Phase 2 through yesterday March 23, 2016. Please advise if you should need any additional information or assistance relative to this matter.

Regards,

Jared M. Bordelon, P.E., M.B.A.
Senior Project Manager

<Blockedhttp://www.quickforensics.com/>

Alamosa Business Park
21449 Marion Lane <x-apple-data-detectors://1/> , Suite 6
Mandeville, LA 70471
Office: (985)-249-5130 <tel:985-249-5130>
(877)-224-4500 <tel:1-877-224-4500>

Cellular: (318)-359-0236
Email: jbordelon@quickforensics.com <mailto:jbordelon@quickforensics.com>

Blockedwww.quickforensics.com <Blockedhttp://www.quickforensics.com/>

From: STEWART, Anthony [mailto:ASTEWARD@swbno.org]
Sent: Wednesday, March 23, 2016 2:52 PM
To: Jared Bordelon; quickforensics@aol.com <mailto:quickforensics@aol.com>
Subject: FW: Prytania visit.

Guys, please respond as usual. Thanks

From: MAQBOOL, Mubashir
Sent: Tuesday, March 22, 2016 2:41 PM
To: STEWART, Anthony
Subject: Fwd: Prytania visit.

Please request Quick to provide the March data for Prytania St. ASAP.

Thanks

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: Sean Walsh <swalsh@eustiseng.com <mailto:swalsh@eustiseng.com> >
Date: 03/22/2016 1:40 PM (GMT-06:00)
To: "Fogarty, John G MVN" <John.G.Fogarty@usace.army.mil <mailto:John.G.Fogarty@usace.army.mil> >, "MAQBOOL, Mubashir" <mmaqbool@swbno.org <mailto:mmaqbool@swbno.org> >
Cc: "Mickal, Larry E MVN" <Larry.E.Mickal@usace.army.mil <mailto:Larry.E.Mickal@usace.army.mil> >, "Boudreaux, Jules D MVN" <Jules.D.Boudreaux@usace.army.mil <mailto:Jules.D.Boudreaux@usace.army.mil> >, "Templeton, John A MVN" <John.A.Templeton@usace.army.mil <mailto:John.A.Templeton@usace.army.mil> >, jsempel@bkusa.com <mailto:jsempel@bkusa.com> >, "SPOONER, Ron" <rspooneer@swbno.org <mailto:rspooneer@swbno.org> >, "Lazaro, Adrian J CONTRACTOR @ MVN" <Adrian.J.Lazaro@usace.army.mil <mailto:Adrian.J.Lazaro@usace.army.mil> >, "Martin, Robert A CONTRACTOR @ MVN" <Robert.A.Martin2@usace.army.mil <mailto:Robert.A.Martin2@usace.army.mil> >, Gwen Sanders <gsanders@eustiseng.com <mailto:gsanders@eustiseng.com> >, Bill Gwyn <gwyn@eustiseng.com <mailto:gwyn@eustiseng.com> >, "Carpenter, Cary D MVN" <Cary.D.Carpenter@usace.army.mil <mailto:Cary.D.Carpenter@usace.army.mil> >
Subject: RE: Prytania visit.

Thanks for the information this morning, John. We understand the position all groups are sharing and appreciate the sensitivity of this item with respect to overall design, construction schedule, costs, and public relations. I'll recap the visit&meeting with our group at the office and respond to Larry with our comments/recommendations ASAP. As a reminder, please send us the dates of sheetpile installation along Prytania Street.

Moby, as we discussed, can you please share with the S&WB a request for March 2016 piezometer data? This information is necessary for an evaluation of hydrostatic conditions AFTER weep hole installation while also during a period of high river stages. The most recent date that we have data measurements is 24 February.

Thanks
Sean

Sean G. Walsh, P.E., LEED AP BD+C

Project Engineer
EUSTIS ENGINEERING

NEW ORLEANS | BATON ROUGE | GULFPORT
LAFAYETTE | LAKE CHARLES

504-834-0157 (Main)
504-613-5794 (Direct)
swalsh@eustiseng.com <mailto:swalsh@eustiseng.com>
Blockedwww.eustiseng.com <Blockedhttp://www.eustiseng.com>

The information contained in this e-mail and any attachments may be confidential and may be proprietary or privileged. It is the property of Eustis Engineering. If you receive this message in error or are not the intended recipient, you should not retain, distribute, disclose, or use any of this information. If you received this e-mail in error, please notify the sender, and delete the original message and all attachments from your computer.

-----Original Message-----

From: Fogarty, John G MVN [mailto:John.G.Fogarty@usace.army.mil]
Sent: Monday, March 21, 2016 7:05 PM
To: Sean Walsh <swalsh@eustiseng.com <mailto:swalsh@eustiseng.com> >; Carpenter, Cary D MVN <Cary.D.Carpenter@usace.army.mil <mailto:Cary.D.Carpenter@usace.army.mil> >; Gwen Sanders <gsanders@eustiseng.com <mailto:gsanders@eustiseng.com> >
Cc: Mickal, Larry E MVN <Larry.E.Mickal@usace.army.mil <mailto:Larry.E.Mickal@usace.army.mil> >; Boudreaux, Jules D MVN <Jules.D.Boudreaux@usace.army.mil <mailto:Jules.D.Boudreaux@usace.army.mil> >; Templeton, John A MVN <John.A.Templeton@usace.army.mil <mailto:John.A.Templeton@usace.army.mil> >; jsempel@bkusa.com <mailto:jsempel@bkusa.com> >; MAQBOOL, Mubashir <mmaqbool@swbno.org <mailto:mmaqbool@swbno.org> >; SPOONER, Ron <rspooneer@swbno.org <mailto:rspooneer@swbno.org> >; Lazaro, Adrian J CONTRACTOR @ MVN <Adrian.J.Lazaro@usace.army.mil <mailto:Adrian.J.Lazaro@usace.army.mil> >; Martin, Robert A CONTRACTOR @ MVN <Robert.A.Martin2@usace.army.mil <mailto:Robert.A.Martin2@usace.army.mil> >
Subject: RE: Prytania visit.

Suggest we meet at the project trailer first then proceed to Prytania St.

John

-----Original Message-----

From: Sean Walsh [mailto:swalsh@eustiseng.com]
Sent: Monday, March 21, 2016 5:42 PM
To: Carpenter, Cary D MVN <Cary.D.Carpenter@usace.army.mil <mailto:Cary.D.Carpenter@usace.army.mil> >; Gwen Sanders <gsanders@eustiseng.com <mailto:gsanders@eustiseng.com> >
Cc: Mickal, Larry E MVN <Larry.E.Mickal@usace.army.mil <mailto:Larry.E.Mickal@usace.army.mil> >; Fogarty, John G MVN <John.G.Fogarty@usace.army.mil <mailto:John.G.Fogarty@usace.army.mil> >; Boudreaux, Jules D MVN <Jules.D.Boudreaux@usace.army.mil <mailto:Jules.D.Boudreaux@usace.army.mil> >
Subject: [EXTERNAL] Re: Prytania visit.

I plan to visit the site at 945am, Cary . Let me know where I should meet you.

Thanks

Sean

On Mon, Mar 21, 2016 at 1:41 PM -0700, "Carpenter, Cary D MVN" <Cary.D.Carpenter@usace.army.mil
<mailto:Cary.D.Carpenter@usace.army.mil> > wrote:

Sean,
We can meet whenever best works for you, we can work around or morning meeting and get a fill in if needed.

So let us know,
Sooner the better.

Cary C

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

CLASSIFICATION: UNCLASSIFIED